> "particular concern is language in the [Proposed Decision] suggesting that complainants alleging violations of laws, rules, or orders must show that the defendant intended to commit such violations....TURN believes that there is no basis in law for an intent requirement and that adding such a requirement would have a detrimental impact on the development of local exchange competition." (Comments of TURN, p. 1.)

Pacific Bell in its reply comments argues that complainants voluntarily interjected accusations of intentional misconduct by Pacific Bell,[12] and that these accusations were properly addressed in the proposed decision.

The decision should not, by implication or otherwise, suggest that intent is a necessary element to show violation of the law in a Section 1702 complaint case. The fact that TURN and others have read it that way has prompted us to make changes in the text, findings and conclusions to try to clarify the point. Nevertheless, as the decision notes, complainants under Section 1702 have the burden of proving that an act or thing done or omitted to be done is in violation of a law, an order or a rule of the Commission. Complainants raised the issue of willful non-compliance with the law. It was because of these allegations that this decision addresses whether or not there was a willful violation. However, intent is not a necessary element of a violation of Section 1702. In any event, the evidence does not support a showing of willfulness. Complainants cited the particular laws, rules and orders that they alleged had been violated. None of these, however, was shown to contain timelines for Pacific Bell to achieve parity in local exchange resale service. Absent timelines, complainants could have proved a Section 1702 violation by showing that Pacific Bell willfully violated the laws, rules and orders cited, or that Pacific Bell unreasonably or negligently had failed to comply with a law, rule or order, or that, regardless of cause, the requirements of a law, rule or order should have been accomplished before the end of 1996 or early 1997 and were not. The decision finds that complainants failed to present substantial

evidence[13] to show a violation of the particular laws, rules and orders cited by the complainants. We find no error in this analysis.

Complainants raise other allegations of error going generally to the weight accorded the evidence produced. These objections have been dealt with adequately in the decision.

Pacific Bell in its comments argues that it is unnecessary for the Commission to order a separate proceeding to monitor the provisioning of access to local exchange carrier operations support systems, since that subject is covered already in the Local Competition and OANAD proceedings. We disagree. As Sprint and other parties comment, the purpose of the new proceeding is to monitor current progress in providing access to operations support systems, a subject not specifically covered in other pending proceedings.

Findings of Fact

1. Complaints against Pacific Bell brought pursuant to PU Code § 1702 were filed on December 11, 1996, by MCI; on December 23, 1996, by AT&T, and on February 20, 1997, by Sprint.

2. Pacific Bell in its answers to the complaints denied any violation of law, rule or Commission order.

3. Pacific Bell moved to dismiss the complaints on grounds that the exclusive remedy for the disputes raised is arbitration under interconnection agreements betwe Pacific Bell and each of the complainants.

4. The complaints were consolidated pursuant to Rule 55, and hearings were conducted on May 12-15, 1997.

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[12] Pacific Bell notes that MCI in its complaint alleged that the facts of the case "demonstrate that the Commission's goal of a competitive local exchange market is susceptible to sabotage by the anticompetitive practices of incumbent LECs." (MCI Complaint, at 20.)

[13] ICG Telecom Group criticizes the decision's requirement of "substantial evidence." Substantial evidence simply means "more than a mere scintilla. It means such relevant e. ence as a reasonable mind might accept as adequate to support a conclusion." (Richardson v. Perales (1971) 402 U.S. 38 401.)

5. Petitions to intervene in this proceeding have been granted to Brooks Fiber Communications, Inc.; Genesis Communications International, Inc.; Working Assets Funding Service, Inc.; the California Association of Competitive Telecommunications Companies; and LCI International Telecom Corporation.

6. As the result of a workshop, MCI withdrew its complaint that Pacific Bell refuses to disclose certain business customer information.

7. AT&T and MCI reported that all parties agree that the issue of a permanent industry solution and schedule for implementing direct access to Pacific Bell operations and support systems is being considered in the OANAD proceeding and is not an issue in this proceeding.

8. MCI on May 15, 1997, withdrew five of the claims in its complaints, stating that they were no longer at issue because of the passage of time and changed facts and circumstances.

9. From the time that MCI first began to submit local service resale orders to Pacific Bell in September 1996, Pacific Bell's backlog in processing those orders was between 4,000 and 5,000 through April 1997.

10. MCI presented evidence to show that between January and mid-April 1997, the average time for Pacific Bell to process an MCI resale order was 14 to 19 days.

11. MCI ceased direct marketing of its local service resale products early in 1997 because of the delays encountered at the Pacific Bell Service Center.

12. The backlog of AT&T orders at the Pacific Bell Service Center rose to a high of 4,508 on February 21, 1997.

13. AT&T cut back its marketing of resale local exchange service on March 26, 1997, because of the inability of Pacific Bell to process orders in a timely fashion.

14. AT&T processed its orders to Pacific Bell through an automated network data mover, while MCI and Sprint initially submitted paper orders by overnight delivery or by facsimile transmission.

15. Sprint presented evidence intended to show that Sprint is precluded from entering the local exchange market through resale of Pacific Bell services for the foreseeable future.

16. Pacific Bell presented evidence to show that AT&T took eight months to solve its own automation problems and was delayed in entering the local exchange resale market until December 1996.

17. The Pacific Bell Service Center received relatively few resale orders during the summer of 1996.

18. In September 1996, MCI submitted more than 1,000 papers orders to the Pacific Bell Service Center.

19. Pacific Bell systems to automate some of the resale orders were not put into operation as early as the Service Center had expected.

20. Pacific Bell underestimated the amount of time it would take its order writers to process orders.

21. The Service Center could process only about 400 orders a day at the beginning of January 1997.

22. Service Center capacity had increased to about 1,400 orders per day by May 1997.

23. Pacific Bell states that the Service Center should be able to process 2,000-2,500 orders per day by the end of June 1997; 4,000-4,500 orders per day by the end of September 1997; and 6,000 orders per day by the end of the year.

24. If competitors are permitted direct access to Pacific Bell's SORD ordering provisioning system, Service Center capacity for processing orders could double, but such use requires training of 4 to 14 weeks for competitors' employees.

Conclusions of Law

1. As the moving party, Pacific Bell has the burden of proof in its motions to dismiss the complaints in light of the interconnection agreements between Pacific Bell and complainants.

2. The Commission has treated motions to dismiss as analogous to motions for summary judgment.

3. The gravamen of the complaints is that Pacific Bell violated state and federal law and orders of the Commission by willfully, negligently or unreasonably failing to provide prompt and efficient resale of local exchange service.

4. In deciding a motion to dismiss before hearing, all doubts should be resolved against the moving party.

5. Pacific Bell's motions to dismiss the complaints of MCI, AT&T, and Sprint should be denied.

6. Pacific Bell admits that it has not achieved parity in providing local exchange resale service to competitors.

7. The fact that Pacific Bell is not at parity in local exchange resale service is not dispositive of these complaints.

8. Under PU Code § 1702, in order to prevail, complainants must show that an act or thing done or omitted to be done by Pacific Bell is in violation of the law or of an order or rule of the Commission.

9. Complainants' witnesses do not claim that Pacific Bell's delay in achieving parity is intentional.

10. Complainants have not shown that Pacific Bell's delays and errors were unreasonable in light of all the facts and circumstances of the transition to local exchange resale service.

11. The Commission on December 9, 1996, in the Pacific Bell-AT&T interconnection agreement, adopted Pacific Bell's proposed six-month grace period for imposition of penalties, commenting that such a "shakedown period" was reasonable.

12. Complainants have failed to show a violation of the no-preference requirement of PU Code § 453 or of the fair competition statement contained in PU Code § 709.

13. Complainants have failed to show a violation of Rule 1.D. of the 1995 Local Competition Rules, since the rule was intended to be a statement of policy rather than a measure of performance.

14. Complainants have failed to show a violation of the 1996 Commission directive requiring Pacific Bell to establish an automated ordering system.

15. Federal requirements that Pacific Bell establish non-discriminatory access to unbundled network elements are being considered in the Commission's Local Competition proceeding and OANAD proceeding.

16. Complainants have failed to show a violation by Pacific Bell of the Telecommunications Act of 1996 or of implementing FCC requirements.

17. The Local Competition proceeding is the more appropriate forum for considering allegations that Pacific Bell has refused to share certain customer information.

18. The complaints of MCI, AT&T, and Sprint should be dismissed.

19. These cases should be closed.

20. Because these complaints have been pending for several months, our order should be made effective immediately.

21. Because Pacific Bell admits that it has not achieved parity in providing local exchange resale service to competitors, the Telecommunications Division should be directed to prepare an immediate Order Instituting Investigation to monitor and encourage development of access to operations support systems.

O R D E R

IT IS ORDERED that:

1. Pacific Bell's motions to dismiss the complaints of MCI Telecommunications Corporation (MCI), AT&T Communications of California, Inc. (AT&T), and New Telco, L.P., doing business as Sprint Telecommunications Venture and Sprint Communications Company L.P. (collectively, Sprint) are denied.

2. The complaints of MCI, AT&T, and Sprint against Pacific Bell are dismissed.

3. The Telecommunications Division is directed immediately to prepare an Order Instituting Investigation through which the Commission may monitor current progress in providing access to operations support systems.

4. Case (C.) 96-12-026, C.96-12-044, and C.97-02-021 are closed.

This order is effective today.

Dated September 24, 1997, at San Francisco, California.

JESSIE J. KNIGHT, JR.
HENRY M. DUQUE
JOSIAH L. NEEPER
RICHARD A. BILAS
Commissioners

President P. Gregory Conlon, being necessarily absent, did not participate.

ATTACHMENT A

List of Appearances

Complainants: William A. Ettinger and Julian Chang, Attorneys at Law, for AT&T Communications of California, Inc.; LeBoeuf, Lamb, Greene & MacRae, LLP, Thomas E. McDonald, Attorney at Law, and William C. Harrelson, for MCI Telecommunications Corporation; and Renee Van Dieen, Attorney at Law, and Richard Purkey, for Sprint Communications Company, L.P., and New Telco L.P.

Defendant: Ed Kolto-Wininger, Attorney at Law, for Pacific Bell.

Intervenor: Goodin, MacBride, Squeri, Schlotz & Ritchie, John Clark, Attorney of Law, for Genesis Communications International, Inc.; Jody London, for Working Assets Funding Service; Goodin, MacBride, Squeri, Schlotz & Ritchie, Thomas J. MacBride, Jr. and Jeffrey D. Gray, Attorneys at law, for California Association of Competitive Telecommunications Companies; Morrison & Foerster, Mary Wand and Glenn Harris, Attorneys at Law, for Brooks Fiber Communications; and Morgenstein & Jubelirer, Rocky Unruh, Attorney at Law, Judith Holiber, and Eliot S. Jubelirer, for LCI International Telecom Corporation.

Interested Parties: Graham & James, Doug Orvis and Marty Mattes, Attorneys at Law, for California Payphone Association; Bruce M. Holdridge and Law Offices of Earl Nicolas Selby, Earl Nicholas Selby, Attorney at Law, for ICG Communications, Inc.; and Kurt Rasmussen, for GTE California Incorporated.

State Service: Monica McCrary, Attorney at Law, and Linda Woods, for the Consumer Services Division; and Phillip Enis and Karen Jones, for the Telecommunications Division.

(END OF ATTACHMENT A)